111-216

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 283.

AUGUSTUS H. BURLEY, RECEIVER OF THE COOK COUNTY NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE GERMAN AMERICAN BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 29, 1881.

1 United States of America, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, or some of you, between Augustus H. Burley, receiver of the Cook-county National Bank, plaintiff, and the German-American Bank, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the supreme court of the United States, at the capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the supreme court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, chief justice of the supreme court of the United States, this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and fifth.

[SEAL.] JOSEPH M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed June 18th, 1884.

SAM'L BLATCHFORD,
Circuit Judge.

2 Due service of the within writ of error admitted this 21st day of June, 1881.

EDWARD SALOMON,
Def't's Att'y.

[Endorsed:] United States supreme court; Augustus H. Burley, receiver, pl'ff in error, against The German-American Bank, def't in error; writ of error; U. S. circuit court; filed Jun. 21, 1881; Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA, } ss.
Southern district of New York, }

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedi-
3 ence thereto, do hereby certify that the following pages, numbered from four to eighty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Augustus H. Burley, receiver of the Cook-county National Bank, plaintiff in error, against The German-American Bank, defendant in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 24th day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 *Summons for Relief.*

Court of common pleas for the city and county of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendant.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 61 Wall st., New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated June 4th, 1877.

CHAS. E. WHITEHEAD,
Plaintiff's Attorney.

5 Court of common pleas for the city and county of New York.

A. H. Burley, as receiver of the Cook-county National Bank,
vs.
The German-American Bank.

The complaint of A. H. Burley, the above-named plaintiff, who sues as receiver of the Cook-county National Bank, a corporation

under and formerly doing business at Chicago, in the state of Illinois, by virtue of the laws of the United States respectfully shows:

I. That on the 20th day of February, 1875, the above-named defendant, being a corporation created under the laws of the state of New York, held three certain promissory notes, payable in four months after date, made by the Charter Oak Life Insurance Co., endorsed by J. C. Walkley, for ten thousand dollars each,
6 and maturing on said day, as collateral security for a loan of $25,000.

II. That, as plaintiff is informed and believes, on said day the said notes were paid in full by the maker thereof, whereby not only the money advanced by the defendant, for which they were held as security, was paid, but also a balance of about five thousand dollars above the loan was paid to the defendant.

III. That the said three promissory notes were at said date the property of said plaintiff, as receiver of the Cook-county National Bank.

IV. That defendant received notice of such ownership prior to the time of said payment.

V. That the plaintiff has demanded the balance of said moneys, amounting to five thousand dollars, but the defendant has refused to pay the same, or account therefor.

VI. That on the 1st day of February, A. D. 1875, said Cook-county National Bank was put into liquidation, and the plaintiff was appointed the receiver thereof, by the comptroller of the
7 currency of the United States.

And the plaintiff shows to the court now here the order putting said Cook-county National Bank into liquidation and appointing the plaintiff such receiver, etc.

Wherefore the plaintiff demands judgment for five thousand dollars, and interest from said date.

CHAS. E. WHITEHEAD,
Pl'tiff's Attorney.

STATE OF ILLINOIS, } *ss.*
County of Cook, }

A. H. Burley, being sworn, says that he was at the date in the foregoing complaint mentioned the receiver of the Cook-county National Bank, and that the facts stated in the foregoing complaint are true, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

A. H. BURLEY.

Subscribed and sworn to before me this 14th day of April, A. D. 1877.

[L. S.] NAPOLEON B. BRANT,
Notary Public, Cook county, Illinois.

8 [Endorsed:] A. H. Burley, receiver of the Cook-county Nat'l Bank, *vs.* The German-American Bank; copy sum-

mons and complaint; U. S. circuit court; filed Oct. 15th, 1877; John I. Davenport, clerk; rec'd by M. Rocholl, Reading, June 7, 1877.

9 Court of common pleas for the city & county of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendants.

First Defence.—The above-named defendants, answering the complaint in this action, alleges on information and belief that on or about the twentieth day of October, 1874, one Chauncey T. Bowen borrowed of these defendants the sum of $25,000, and as collateral security for such loan delivered to the defendants the promissory notes of the Charter Oak Life Insurance company for the payment of the sum of $30,000; that said promissory notes were negotiable and not then due, and were duly transferred and delivered by said Bowen to these defendants, said Bowen then having the legal title to said notes and then claiming, and these
10 defendants believing him, to be the owner thereof; that when said notes became due and payable, to wit, on the twentieth day of February, 1875, they were paid to these defendants, who applied the proceeds thereof to the payment of said loan and interest, leaving a surplus due said Bowen of four thousand four hundred and fifty-five 56-100 dollars in their hands; that on or about the fourteenth day of April, 1875, these defendants, then believing and having good reason to believe that the said last-mentioned sum of money so in their hands belonged to the said Bowen, upon his order and direction applied the same towards the payment of certain other promissory notes then held by these defendants, executed by other persons and endorsed by said Bowen, which said last-mentioned promissory notes these defendants, upon such payment, then and there delivered up.

These defendants admit that they are and were a corpora-
11 tion as in the complaint alleged; that the plaintiff has demanded of them payment of the balance of said thirty thousand dollars, and they have refused to pay it or account for the same to the plaintiff.

These defendants do not know and have not information sufficient to form a belief whether the Cook-county National Bank was put into liquidation or the plaintiff appointed the receiver thereof as in the complaint alleged.

Except as hereinbefore stated or admited, these defendants on information and belief deny each and every allegation in the said complaint contained.

Second Defence.—And these defendants, for a further and second defence, allege on information and belief that on or about the thirty-first day of August, 1871, the said Chauncey T. Bowen made an agree-

ment in writing with these defendants, bearing date on that day, whereby he promised and agreed, amongst other things, to
12 and with said defendants that all securities, bonds, stocks, things in action, or other property or evidence of property which then had been, or might at any time thereafter be, deposited or left by him or for his account with these defendants, whether specifically pledged or not, might be held by these defendants and should be deemed to be, & were thereby, pledged as security for the payment of any sum or sums of money which had been or might thereafter be loaned, paid, or advanced to him or for his account or use by these defendants, and also for the payment of every other indebtedness, liability, or engagement on his part to said defendants; that at the time of the delivery and deposit of said notes of the Charter Oak Life Insurance company by said Bowen to and with these defendants, the said agreement was a then continuing and existing promise and agreement under which these defendants received said last-mentioned notes from said Bowen as collat-
13 eral security not only for the said loan of $25,000 hereinbefore mentioned, but also as collateral security for the payment of any and all other indebtedness, liability, or engagement on the part of said Bowen to said defendants then existing or which might at any time thereafter exist; that such other indebtedness, liability, or engagement did thereafter arise and exist on the part of said Bowen to these defendants prior to, and continuing up to and after, the twentieth day of February, 1875, to wit, that said Bowen became indebted and liable to pay to these defendents large sums of money, to wit, more than the said balance of $4,455.56 hereinbefore mentioned, as endorser of certain promissory notes; that by virtue of said original agreement and understanding these defendants held said notes of said Charter Oak Life Insurance company prior to and on said 20th day of February, 1875, also as collateral security of said last-mentioned liability of said Bowen;
14 that these defendants after said 20th day of February, 1875, in pursuance of said original agreement and understanding with said Bowen, and upon his special direction and request, applied the said balance of $4,455.56 towards the payment of said last-mentioned liability of said Bowen; and that at the time when said deposit of said notes of said Charter Oak Life Insurance company was made as aforesaid by said Bowen, as well as afterwards when said subsequent liability of said Bowen as endorser was created and said notes of said Charter Oak Life Insurance company became collateral security to said last-mentioned liability, as well as on said 20th day of February, 1875, when said balance of $4,455.56 came into the possession of these defendants as aforesaid, as well as afterwards when said last-mentioned sum was applied towards the payment of said liability of said Bowen as endorser as aforesaid; and during all said time these defendants believed, and had good reason to believe, and had no notice to the contrary from said
15 plaintiff, that said notes of said Charter Oak Life Insurance

company were the property of said Bowen and that he had good right to dispose of the same and the proceeds thereof.

And as a part of this second and separate defence, these defendants on information and belief reiterate their denials, hereinbefore contained, of each and every allegation in said complaint not herein stated or admitted.

SALOMON & BURKE,
Defendant's Attorneys,
No. 4 Wall st., N. Y.

CITY & COUNTY OF NEW YORK, *ss.*

Henry Rocholl, being duly sworn, says that he is the president of the above-named defendants; that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. ROCHOLL.

Sworn to before me this 27th day of June, 1877.
RUDOLPH DULON,
Notary Public,
No. 4 Wall st., New York.

16 (Endorsed:) New York common pleas; A. H. Burley, as receiver, &c., against the German-American Bank; answer; Salomon & Burke, attorneys for defendants, No. 4 Wall st., New York; due and timely service of the within answer is hereby admitted; N. Y., June 27th, 1877; Chas. E. Whitehead, pl'ff's attorney; U. S. circuit court; filed October 15, 1877; John I. Davenport, clerk.

17 Court of common pleas for the city and county of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendant.

Know all men by these presents that the German-American Bank, as principal, and Henry Rocholl, of the city of Brooklyn, county of Kings and state of New York, and Emil Magnus, of the same place, as sureties, are held and firmly bound unto A. H. Burley, as receiver of the Cook-county National Bank of Chicago, in the state of Illinois, in the sum of one thousand dollars, to be paid to the said A. H. Burley, his successors and assigns, for which payment well and truly to be made, the said the German-American Bank binds itself and its successors, and the said Henry Rocholl and Emil Magnus binds themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

18 In witness whereof the said the German-American Bank has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and attested by its cashier. And the said Henry Rocholl and Emil Magnus have hereunto set their hands and seal this day of July, 1877.

Whereas an action was commenced on or about the seventh day of June, 1877, in the court of common pleas for the city and county of New York by the said A. H. Burley, as receiver of the Cook-county National Bank, and the same is now awaiting trial in said court and is removable into the circuit court of the United States for the southern district of New York, under the provisions of the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes;" and whereas the said the German-American Bank has filed its petition for the removal of the said action into the said

19 circuit court—

Now, therefore, the condition of this obligation is such, that if the above bounded the German-American Bank, or its legal representatives, shall enter or caused to be entered in the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that said suit has been wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if special bail was originally requisite therein, then this obligation is to be void; otherwise it is to remain in full force & virtue.

THE GERMAN-AMERICAN BANK,
H. ROCHOLL, *Pres.*
Attest: M. F. READING,
For H. ROCHOLL. [SEAL.]
EMIL MAGNUS. [SEAL.]

Sealed and delivered in presence of—
[SEAL.] RUDOLF DULON.

20 STATE OF NEW YORK, } *ss.*
City and county of New York, }

On this fourteenth day of July, 1877, before me personally came Michael F. Reading, cashier of the German-American Bank, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in Montclair, New Jersey; that he was cashier of the said the German-American Bank, and knew the corporate seal thereof; that the seal affixed to the above instrument was such corporate seal; that it was so affixed by the order of the board of directors of said bank, and that he signed his name thereto by the like order as cashier of said bank. And the said Michael F. Reading further said that he was acquainted with

Henry Rocholl, and knew him to be the president of said bank; that the signature of the said Henry Rocholl subscribed to the said instrument was in the genuine handwriting of the said Henry Rocholl, and was thereto subscribed by the like order of
21 the said board of directors and in the presence of him, the said Michael F. Reading.

RUDOLF DULON,
Notary Public, No. 4 Wall st., New York.

STATE OF NEW YORK, }
City and county of New York, } *ss.*

On this sixteenth day of July, 1877, before me personally came Henry Rocholl and Emil Magnus, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

RUDOLPH DULON,
Notary Public, No. 4 Wall st., New York.

22 STATE OF NEW YORK, }
City and county of New York, } *ss.*

Henry Rocholl, above named, being duly sworn, says that he is a resident of the state of New York and a householder therein, and worth double the sum specified in the above bond, over all his debts and liabilities, and exclusive exempt by law from execution.

H. ROCHOLL.

Sworn to before me this sixteenth day of July, 1877.

RUDOLF DULON,
Notary Public, No. 4 Wall st., New York.

STATE OF NEW YORK, }
City and county of New York, } *ss.*

Emil Magnus, above named, being duly sworn, says that he is a resident of the state of New York and a freeholder therein, and worth double the sum specified in the above bond, over all his debts and liabilities, and exclusive of property exempt by law from execution.

EMIL MAGNUS.

Sworn to before me this sixteenth day of July, 1877.

23 RUDOLF DULON,
Notary Public, No. 4 Wall street, New York.

24 [Endorsed:] New York common pleas; A. H. Burley, as receiver of the Cook-county National Bank, against The German-American Bank; bond on removal of cause to U. S. circuit court; Salomon & Burke, att'ys for def't, No. 4 Wall street, New York; filed July 25th, 1877.

25 Court of common pleas for the city and county of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendant.

To the court of common pleas for the city and county of New York:

The petition of the German-American Bank, the above-named defendant, respectfully shows:

That it is a corporation created by and under the laws of the state of New York, and having its only place of business in the city of New York, in said state; that the above-entitled action was commenced on or about the seventh day of June, 1877, by the service of the summons and complaint; that the above-named plaintiff is, and was at the time of the commencement of said action, a citizen of the state of Illinois, and a resident of the city of
26 Chicago, in said state; that, as appears from the said complaint, this action is brought to recover the sum of five thousand dollars and interest, and therefore the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; that the term of this court commencing on the first Monday of October, 1877, is the first term at which the said action could be tried, and that the same has not yet been tried.

Your petitioner, referring to the act of Congress approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," therefore prays that this court proceed no further in this action, and that it order said action to be removed to the circuit court of the United States for the southern district of New York.

New York, 14 July, 1877.

THE GERMAN AMERICAN BANK,
H. ROCHOLL, *Pres't.*

27 STATE OF NEW YORK, }
City and county of New York, } *ss.*

Henry Rocholl, being duly sworn, says that he is president of the German-American Bank, the above-named petitioner; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

H. ROCHOLL.

Sworn to before me this fourteenth day of July, 1877.

RUDOLF DULON,
Notary Public, No. 4 Wall street, New York.

28 [Endorsed:] New York common pleas; A. H. Burley, as receiver of the Cook-county National Bank, against The German-American Bank; petition for removal of cause to U. S. circuit court; Salomon & Burke, att'ys for def't, No. 4 Wall street, New York; filed July 25, 1877.

29 Court of common pleas for the city and county of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendant.

At special term, held at chambers, New York, July 25th, 1877; present: Hon. George M. Van Hoesen, judge.

On reading and filing the petition of the above-named defendants in the above-entitled action, whereby it appears that it is a corporation created by and under the laws of the state of New York, having its only place of business in the city of New York, in said state; that the said action was commenced on or about the seventh day of June, 1877, by the service of the summons and complaint; that the above-named plaintiff is and was at the time of
30 the commencement of said action a citizen of the state of Illinois; that, as appears from the said complaint, said action is brought to recover the sum of five thousand dollars and interest, and therefore the matter in dispute exceeds the sum of five hundred dollars, exclusive of cost; that the term of this court commencing on the first Monday of October, 1877, is the first term at which the said action could be tried, and that the same has not yet been tried, and praying this court to proceed no farther in this action pursuant to the provisions of the act of congress in that behalf, approved March 3, 1875; and said defendant having also made and filed with said petition its bond, with good and sufficient sureties for its entering at the next term of the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in said action and for the payment of all costs which may be awarded if said circuit court shall
31 hold that said suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in said suit if special bail was originally requisite therein, as required by said act of congress—

It is ordered that this action be removed to the circuit court of the United States for the southern district of New York, and that this court proceed no farther in this action.

Ent. G. M. V. H.

CLERK'S OFFICE,

Court of common pleas for the city and county of New York.

I, Nathaniel Jarvis, jr., clerk of the court of common pleas for

the city and county of New York, do hereby certify that I have compared the foregoing bond, petition, and order with the originals thereof, on file in my office, and that each is a copy of the said original and of the whole thereof, constituting the entire record of the proceedings in this action on file in my office.

32 In testimony whereof I have hereto affixed the seal of the court.

Aug. 22, 1877.

NATH'L JARVIS, JR.,
Clk.

33 [Endorsed:] New York common pleas; A. H. Burley, as receiver of the Cook-county National Bank, against The German-American Bank; order removing cause to U. S. circuit court, southern district of New York; Salomon & Burke, attorneys for def't, 4 Wall street, N. Y.; filed July 25, 1877; N. Jarvis, jr., clerk.

34 [Endorsed:] A. H. Burley, as receiver of the Cook-county National Bank, against The German-American Bank; certified copy record from court of common pleas for the city and county of New York; Salomon & Burke, deft's attorneys, 4 Wall st., N. Y.; U. S. circuit court; filed Oct. 15, 1877; John I. Davenport, clerk.

35 Circuit court of the United States for the southern district of New York.

Augustus H. Burley, as receiver of the Cook-county National Bank,
against
The German-American Bank.

We hereby consent that Edward Salomon be substituted in our place and stead as attorney for the defendant in the above-entitled action, and that an order to that effect be entered hereon.

Dated New York, September 8th, 1879.

SALOMON & BURKE,
Attorneys for Defendant.
EDWARD SALOMON,
Surviving partner of said firm of Salomon & Burke.

We consent to such substitution.

[SEAL.] THE GERMAN-AMERICAN BANK,
By H. ROCHOLL, *Pr.*

At special term held at chambers, New York, , 1879—
present: Hon. , justice—

36 Upon reading and filing the annexed consent, and on motion of Edward Salomon,

It is ordered, That said Edward Salomon be, and he is hereby, substituted as attorney for the said defendant in the above-entitled action.

SAM'L BLATCHFORD.

[Endorsed:] U. S. circuit court, southern dis't of N. Y.; A. H. Burley, as rec'r, &c., against The German-American Bank; consent and order of substitution; Edward Salomon, att'y for defendant, 115 Broadway, New York city; U. S. circuit court; filed Oct. 1, 1879; John I. Davenport, clerk.

37 United States circuit court, southern district of New York.

A. H. Burley, as receiver of the Cook-county National Bank, plaintiff,
against
The German-American Bank, defendant.

I hereby consent that Salomon, Hall & Dulon be substituted in my place and stead as attorneys for the defendant in the above-entitled action, and that an order to that effect be enteren hereon.

Dated New York, November 10th, 1880.

EDWARD SALOMON,
Attorney for Defendant.

At a stated term held at the U. S. court building, New York, November 12th, 1880—present: Hon. Samuel Blatchford, justice—

38 Upon reading and filing the annexed consent of Edward Salomon, and on motion of Salomon, Hall & Dulon, it is ordered that Salomon, Hall & Dulon be, and they are thereby, substituted as attorneys for the said defendant, the German-American Bank, in the above-entitled action.

SAM'L BLATCHFORD.

[Endorsed:] U. S. circuit court, southern dist. of New York; A. H. Burley, as receiver, &c., *vs.* The German-American Bank; consent and order of substitution; Salomon, Hall & Dulon, attorneys for defendant, 115 Broadway, New York city; U. S. circuit court; filed Nov. 12, 1880; Joseph M. Deuel, clerk.

39 At a stated term of the circuit court of the United States of America for the southetn district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Friday, the 10th day of December, in the year of our Lord one thousand eight hundred and eighty—

Present: the Honorable Wm. J. Wallace, judge.

Augustus H. Burley, receiver, &c.,
vs.
The German-American Bank.

This case being still on trial, the jurors sworn in it are called and severally answer to their names, except the said juror Lawrence Wells, counsel for the respective parties consenting:

Ordered, That the trial of this cause proceed in the absence of the said juror Lawrence Wells.

Evidence for the defendant: Chancey C. Bowen recalled; Michael F. Reading sworn.

Mr. Salomon sums up the case on the part of the defendant.

Mr. Whitehead sums up the case on the part of the plaintiff.

Charge is thereupon given by the court to the jury, who
40 retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the defendant; and so say they all.

On motion of Mr. Whitehead, ordered that the plaintiff have a stay of proceedings for sixty days, within which to prepare and serve a bill of exceptions herein.

A copy.

J. M. DEUEL, *Clerk.*

Judgment.

United States circuit court for the southern district of New York.

Augustus H. Burley as receiver of the Cook-county National Bank,
vs.
The German-American Bank.

This cause coming on for trial in the term of this court, commencing November 30th, 1880, before the Hon. William J. Wallace, circuit judge, and having been duly reached for trial on the 9th of December, 1880, and a jury having been duly called and empaneled in said cause, and the trial thereof having been proceeded with and concluded on the 10th day of December, 1880, and the said jury having rendered a verdict in favor of said defendant: now, on motion of Salomon, Hall & Dulon, defendant's attorneys, it is
41 Ordered and adjudged, That the complaint in this action be, and the same is hereby, dismissed; and it is further

Ordered and adjudged, That the said defendant recover of the said plaintiff the sum of $85.00, its costs, as taxed by the clerk of this court, and that the plaintiff pay the same to the defendant, and that the said defendant have execution therefor.

Judgment signed this 25th day of May, A. D. 1881.

J. M. DEUEL, *Clerk.*

[Endorsed:] Circuit court of the U. S., southern district of New York; Augustus H. Burley, as rec'r, &c., *vs.* The German-
42 American Bank; judgment roll; 11-15; U. S. circuit court; filed May 25, 1881; Joseph M. Deuel, clerk.

43 Circuit court of the United States.

Augustus H. Burley, receiver of Cook-county National Bank,
against
The German-American Bank.

This cause came on for trial Dec. 9th, 1880, before Justice Wallace and a jury.

The plaintiff opened the case by reading the pleadings and the testimony of Herman Blennerhasset, as follows:

In 1874 & '75 I was one of the firm of Allen, Stephens & Co., 25 Pine st., New York.

We had in our possession three notes made by the Charter Oak Life Insurance Co. for $10,000 each, due in Feb'y, 1875. Those notes belonged to our firm, and we advanced them to the Cook-co. National Bank of Chicago, and we delivered them to Chauncey I. Bowen, who was a director in and the authorized agent in New York of the Cook-co. National Bank of Chicago.

Originally we delivered them to him for our own account
44 to raise money on, and afterward we gave him consent to use them for the Cook-county National Bank.

We took them to the German-American Bank and obtained about $25,000 on them. We made a bill to the Cook-co. National Bank, and also rendered an account at that time, which are here produced.

Allen, Stephens & Co. paid these notes at maturity for account of the Charter Oak Life Insurance Co. Feb'y 20th, 1875. They were sent to our office for payment by the bank messenger at that time. I sent the defendant a letter dated the day before they were due, 20th Feb'y, 1875. [Copy of letter produced.] This letter was sent before the notes were actually paid, and while the notes were waiting for payment in our office, and I waited until I heard that this notice had been received by the bank before I paid the notes.

There was no objection made by the Cook-co. National Bank or its officers, that I ever knew of, to the charging to it of the three notes referred to.

45 The witness, in reply to questions of the plaintiff, further stated:

I have seen the account as I rendered it entered on the books of the Cook-county National Bank at Chicago; those books were in Chicago.

(The counsel for the defendant objected to said answer, and the court sustained the objection, and the answer was excluded, and the plaintiff's attorney excepted to such ruling.)

On cross-examination the witness testified: The members of our,

firm were Benjamin F. Allen, William A. Stephens, & myself. Allen was at same time pres't of Cook-co. National Bank. Mr. Allen has gone into bankruptcy, and a receiver has been appointed for our firm, and our affairs are still unsettled.

The Charter Oak Life Insurance Co. owed us a balance and gave us these notes in liquidations. We got altogether $150,000 of notes to settle that balance.

Our firm did not, I think, get the proceeds of all these notes. My impression is we got all the proceeds of the $150,000
46 paper save the proceeds of the $30,000 paper that went to the German-American Bank.

(The witness, in answer to questions of defendant's counsel, gave the following testimony, which the defendant's counsel proposed to read, whereupon the plaintiff's attorney objected to the same as irrelevant, and as not the best evidence, and as not tending to prove the defense alleged in the answer, to wit, that Chauncey T. Bowen owned the notes described in the complaint, but that it tended to prove that B. F. Allen owned said notes. The defendant claimed the right to introduce the evidence on that issue.

The objection was overruled by the court and the plaintiff excepted, and the evidence was then read as follows:)

There were other Charter Oak Life Insurance notes besides these to the extent of $300,000 received by us, for which our firm gave security to the Charter Oak Life Insurance Co. Allen gave a mortgage to our firm upon all his real estate to secure our
47 firm for the balance due us from the Cook-co. National Bank for advances past and future. It was made 18th November, 1874.

The witness further testified: We had none of this $150,000 of the Charter Oak notes; it had all passed out of our possession at that time.

Nov. 20, 1874, the indebtedness of the Cook-co. National Bank was over $300,000 to us; the mortgages had been given previous to that date. These Charter Oak notes were not procured by Mr. Allen on his individual account—none of them. We also had a firm account with the Charter Oak Life Insurance company & also with B. F. Allen. None of these notes were charged to Allen's individual account. Don't remember the fact of making this bill; have no recollection upon the subject of what I did with the bill after writing it. Recollect on seeing the paper that I got it up for the purpose of the clerks completing it to send it to Chicago.
48 I saw it in Mr. Whitehead's hands within a month, & I am strongly under the impression I saw it, with the letter accompanying it, in Chicago in the possession of the Cook-co. National Bank. There are entries of this transaction on the books of Allen, Stephens & Co. Bowen discounted—that is, sold—none of the notes for B. F. Allen. I didn't tell Bowen that these notes belonged to B. F. Allen & that he was to discount them for B. F. Allen.

The plaintiff's counsel then read in evidence the letter referred to in the examination of Mr. Blennerhasset as having been sent to the defendant's cashier as follows:

20TH FEBRUARY, 1875.

D. H. SCHREINER, esq.,
Cashier German-American Bank, N. Y.

DEAR SIR: Concerning five pieces, ten thousand dollars each, Charter Oak Life Insurance co. paper due to-day, presented by you for payment at 25 Pine st., we beg to notify you that three of them endorsed by J. C. Walkley and not by B. F. Allen, we under-
49 stand to be with you as collateral for a loan to Chauncey T. Bowen of $25,000. Before payment is made we beg to call your attention to the fact that Mr. Bowen was never the owner of that paper, and that the surplus that will remain after payment of Mr. Bowen's loan should be credited to Cook-co. Nat. Bank of Chicago.

Very truly,
ALLEN, STEPHENS & CO.

Plaintiff's counsel then read in evidence the account of Allen, Stephens & Co. with the Cook-co. National Bank, referred to by witness, as follows:

Exhibit E.

NEW YORK, *20th Nov.*, 1874.

By Allen, Stephens & Co.

Charge to Cook-co. Nat. Bank 30,000 C. O. Life Ins. paper due 20 Feb'y, 1875	30,000	00
Less disc't 7 per cent	536	66
	29,463	34

(In pencil:) Mem.—Bowen reports the paper 30,000 at German-American Bank as collateral to a call loan to you.

A., S. & CO.

50 Plaintiff's counsel read the appointment of A. H. Burley as receiver of the Cook-co. Nat. Bank, dated Feb'y 1st, 1875, (Exhibit A.)

Plaintiff's counsel then read the examination of AUGUSTUS H. BURLEY, as follows:

I was appointed receiver Feb'y 1st, 1875, & immediately entered upon the duties of the office, and took possession of the papers of the bank, among which I found the statement of account dated New York, Nov. 20th, '74, by Allen, Stephens & Co., for 30,000 C. O. Life Ins. co. paper due 20th Feb'y, 1875, for 30,000, less discount 7 per cent., (536.66,) 29,463.34, which is annexed to Blennerhasset's deposition; also a statement of account of Allen,

Stephens & Co. from Oct. 1st to Nov. 30, 1874, which accompanies this affidavit.

(Exhibit B annexed.)

Defendant's counsel then read from the cross-examination as follows:

The Cook-co. Nat. Bank closed its doors Jan'y 18th, 1875. B. F. Allen failed at same time.

51 In journal C of the Cook-co. Nat. Bank books produced under date of Nov. 23d, 1874, Allen, Stephens & Co. are credited with paper by Bowen, $29,463.34. It appears written between two lines. There are seven credit entries to Allen, Stephens & Co., and no other items among them are entered in the same manner; the whole entry was evidently crowded in a small space.

I don't know that any money was received from Allen, Stephens & Co. that day.

General ledger B, page 811, Allen, Stephens & Co. are credited under date of Nov. 23d, paper by Bowen, $29,463.34. Journal C is a book of original entry. The amount so credited to Allen, Stephens & Co. was on the same day charged to B. F. Allen on page 470 of the individual journal under date of Nov. 23, '74.

The amount is 29,463.34, and is posted in individual ledger B, page 4.

The plaintiff's counsel then read the following questions and answers:

52 You may state what other entries there are in regard to this matter in the books of the Cook-co. National Bank?

Under date Dec. 10th, on page 782, journal C to gen'l ledger, Allen, Stephens & Co. are charged with error. It says 11 | 13, $29,463.34. The 11 | 13 is evidently intended for 11 | 23, (11th month, 23rd day,) as there are no figures in the book corresponding with it on the 13th of Nov. in this journal.

Same entry is posted to the debit of Allen, Stephens & Co. upon page 811 under date of December 10th in ledger B.

In the individual journal, under date of Dec. 10th, on page 513, B. F. Allen is credited with $29,463.34, which credit is posted into his account on page 4 of individual ledger B, the meaning of which entries is that on the 10th of Dec., 1874, Allen, Stephens & Co. were charged back the amount credited them on the 23d of Nov., and B. F. Allen was credited with the amount with which he had been charged on the 23rd of Nov.

53 The plaintiff's counsel then read the following question:

What other entries in regard to this matter do you find in the books of said bank?

Defendant's counsel objected to the answer of the witness as contained in his deposition, because it referred to entries made June 25th, 1875, long after the plaintiff had been appointed receiver of the bank, and same was excluded, and plaintiff excepted.

The excluded answer is as follows: In the journal to the general ledger, on page 71, under date of June 25th, 1875, Allen, Stephens

& Co. are credited with C. O. paper used at the German, $29,463.34, and interest account is credited with 536.66 C. O. paper. On page 72 of the same ledger, on the same date, bills receivable are charged with C. O. paper at German $30,000.

On the same page of the same ledger the German-American Bank is credited at the same date with "call loan, October 20th,
54 $25,000 interest," right under it, October 20th to February 23rd, $612.50.

Same date and page bills receivable have "credit C. O. paper $30,000. Loan account is debited the German-American Bank, Oct. 20, $25,000. Interest account is debited "ditto" $612.50. The meaning of which entries is that Allen, Stephens & Co. are credited with $30,000 of Charter Oak paper, less the discount upon the same of $536.66, which amount is credited to interest account; that the $30,000 represented by these figures is charged to bills receivable as "C. O. paper at German." Bills receivable are credited with $30,000. German-American Bank is charged with $30,000. German-American Bank is credited with a call loan of $25,000, and interest upon it of $612.50. Loan account is indebted with a call loan of $25,000, and interest account is debited with interest $612.50.

Plaintiff's counsel then read the following question: "Then, according to the several entries that you have mentioned, to
55 whom does that $29,463.34 stand to the credit?"

Defendant objected to the question because the entries would speak for themselves, and it and the answer thereto referred to entries of June 25, 1875, made after plaintiff had been appointed receiver; it was excluded and plaintiff excepted. The answer was "Allen, Stephens & Co."

Plaintiff's counsel then read the following question: You may state by whom and under what circumstancss these last entries were made and how they came to be made.

(Defendant's counsel objected to the answer to this question because it refered to entries made June 25, 1875, after the plaintiff had been appointed receiver, which entries had been excluded; the answer was excluded and plaintiff excepted.)

Plaintiff's counsel then read the following question: Have you examined the books of said bank in regard to the entries which have been the subject-matter of that examinasion, and if so, please state whether or not, in your judgment, the account as it
56 now stands is correct.

(Objection by defendant because the statements in the books explain themselves. and because the question also includes entries made June 25, 1875, after the plaintiff had been appointed receiver; excluded and exception by plaintiff.)

The plaintiff's counsel then read the following question from the cross-examination of the witness: Please state whether or not for the call loan of the German-American Bank, as shown by the entry of Mr. Spink, the books show the Cook-county National Bank

received the money for ~~each~~ such loan so made by the German-American Bank.

(Objection was made by the defendant because the question refers to an entry made June 25, 1875, after the plaintiff had been appointed receiver, and not in evidence; the question was excluded and the plaintiff excepted.)

The deposition contained the following answer to this ques-
57 tion: There are no entries upon the books that I have been able to find which show that the particular amount of money came directly to the Cook-county National Bank.

In further direct-examination the witness added: It was not the custom of Allen, Stephens & Co. or others to send money to Chicago, but when money was borrowed for the Cook-county National Bank in New York, such money was usually placed to the credit of said bank in New York, with which to pay the drafts drawn by said bank in Chicago on New York.

Plaintiff then read in evidence the account current of Allen, Stephens & Co. with the Cook-co. National Bank, from Oct. 1st to Nov. 1st, '74, being the account referred to by A. H. Burley in his examination as being found among the papers of the bank, (copy annexed.)

Plaintiff and defendant admitted that the Cook-co. National Bank was a banking corporation. Plaintiff proved the interest on $4,455.56 from April 14, '75, at 6 per c., was $1,511.66, and then read in evidence two depositions of Benjamin F. Allen, the
58 first of which was taken by the plaintiff at Des Moines, Iowa, February 13th, 1879, in which said witness testified that he procured Chauncy Bowen to get him a loan from the German-American Bank in the city of New York, about Oct. 20, 1874; that "I think the loan was for myself individually, and that I used the money;" that the amount of the loan was $25,000; that he did not know on what collateral it was made, as he did not provide the collaterals; that he had been subsequently informed that the collaterals were three notes made by the Charter Oak Life Ins. company; that he failed in business after the maturity of that note; that he did not pay it, and had nothing to do with its payment; that he gave no instructions to transfer the collaterals on which that loan was made, or the proceeds, to any other account; that he was indebted to the Cook-county National Bank on October 20, 1874, to the amount of several hundred thousand dollars, which
59 indebtedness still remained, and that the Cook-county National Bank failed January 19, 1875.

The second deposition of said Benjamin F. Allen was taken at Leadville, in Colorado, December 20, 1879, and in it said witness testified that the Charter Oak Life Ins. company notes, which had been given as collateral security to a loan of $25,000 of the defendant, as he had testified to in his former deposition, taken at Des Moines, belonged to the Cook-county National Bank at the time when said loan was obtained; that it was obtained for the use

of the Cook-county National Bank; that he had no accounts or records of the transactions with him, and had inspected none recently; but that since his evidence had been taken at Des Moines he had carefully considered the matter and examined copies of the accounts, and was satisfied that he was mistaken at that time; that he was now satisfied that the $30,000 Charter Oak paper, at the time it was placed with the German-American Bank by Bowen, as collateral for the $25,000 loan, belonged to the Cook-county
60 National Bank; that the $25,000 received by Bowen went to the credit and benefit of the Cook-county National Bank at some bank in New York city; that the difference between the $30,000 of the Charter Oak paper and the $25,000 loan and interest belonged to the Cook-county National Bank, and the reason why he so believed was because he never used or attempted to use the $5,000 margin, and never gave any directions for its application to any purpose; that when he was examined at Des Moines he had not carefully considered the matter, and answered according to his impressions at that time, not having had access to any books or papers with which to refresh his memory.

Both depositions were taken upon written interrogations of the plaintiff, and without cross-examination on the part of the defendant.

The plaintiff thereupon rested.

Defendant opened his case by calling CHAUNCEY T. BOWEN, who testified—

61 In 1874 I was in the employ of the Cook-county National Bank; was also agent for B. F. Allen, and other matters in Chicago besides.

B. F. Allen was a private banker at Des Moines, and dealt in all kinds of securities—a general speculator. He was senior member of Allen, Stephens & Co., and president of the Cook-county National Bank.

What was the nature of Mr. Allen's individual transactions that you did for him in the summer & fall of 1874?

(Objected to by the plaintiff as inadmissible under the answer to introduce evidence to prove ownership of the notes in B. F. Allen, or any one save in Chauncey C. Bowen.

The defendant contended that under the general denial in the answer he was at liberty to prove ownership of the notes in question in B. F. Allen or any one else, as the answer raised the issue of title.

The court, after argument, held with the defendant, and allowed the question, to which ruling the plaintiff excepted.

62 The same objections, rulings, and exceptions were made and taken to the following questions and answers in regard to like matters:)

A. I made purchases and sales of stocks, & made loans and collections for him in New York & Chicago.

Q. If you collected money for him in the city of New York, what did you do with it?

A. Placed it to the credit of the Cook-co. National Bank.

In 1874 Mr. Blennerhasset, of Allen, Stephens & Co., handed me some three or four hundred thousand dollars of Charter Oak Life Insurance company notes.

What did he tell you?

He said that Mr. Allen was to make a loan.

(Same objection, ruling, and exception as above.)

I pledged three ten-thousand-dollar notes with the German-American Bank for which I received a loan of $25,000; they were a part of a large lot.

When these notes were first placed in your hands was
63 anything said by Mr. Blennerhasset to you in relation to the origin and purposes of the notes?

Yes.

(The plaintiff objected to this question and statement on the grounds above stated, and to all like evidence, and noted an exception to the rulings of the court.

The question and answer was allowed and the witness continued:)

Mr. Blennerhasset stated that they were trying, and had perfected a loan with the Charter Oak Life Insurance company for Mr. Allen, & that these notes were given in anticipation of their receipts—the Charter Oak co. receipts, as they did not at that time have that amount of money to spare, & they had issued this paper at four months' time.

The $50,000 of notes that he gave me first I sold, and he told me to place them to the credit of the Cook-co. National Bank, which I did. I have no recollection of any instructions given with the subsequent different lots of notes. I sold all but those I made a loan on. I acted with the cashier of the German-American Bank,
64 Mr. Schreiner, since resigned. Mr. Schreiner said it was queer for an insurance company to give paper. I said to him that they had given this for the purpose of making a loan to Mr. Allen in anticipation of their receipts. The proceed of the loan on the three notes I placed to the credit of the Cook-co. National Bank in the First National Bank of New York city, the same as I had done with the others. I saw this letter of February 20th, 1875, in the early part of March, at the German-American Bank; Mr. Schreiner showed it to me. Some time in March I had a conversation with B. F. Allen in regard to this surplus.

Q. State, if anything, what Mr. Allen said, or whether he gave you any directions in relation to the use of this surplus.

(Objection by plaintiff—allowed as competent evidence to contradict the testimony of the witness Allen on that subject—exception by plaintiff.)

65 Mr. Allen told me to appropriate the surplus, some $4500, upon a note of his at the German-American Bank for $20,000 on a call loan made in July previous to this. I had made the loan

and endorsed the note—Allen's note, with some collaterals. The collaterals were sold. I directed in April the application of this surplus toward the payment of that note of Allen's with my endorsement.

Direct examination of Bowen continued:

I don't think Blennerhasset ever gave me any other directions about these notes. I have not any recollections of his delivering these notes to me to raise money on for their account. He did not afterward give me a consent to use them for their account. He gave me no special instructions.

[By a juror:] Did you not say yesterday that Mr. Allen gave you the notes?

No; I have gone through bankruptcy and been discharged.

On cross-examination witness Bowen further testified:

66 The loan I made of the defendant was a call loan without any note, made by simply handing the collaterals, which were the three Charter Oak Life Ins. co. notes of $10,000 each, payable at the office of Allen, Stephens & Co., in Pine st. The proceeds of this loan of $25,000 I placed to the credit of the Cook-county National Bank in the First National Bank in this city. It was not mine. I never used it and never claimed it, & deposited it all here right away the very day I got it. It was the habit of the Cook-co. National Bank to draw out of the First National Bank whatever sums I got for it and deposited there, and this money was actually subject to their drafts and drawn out by them.

I put the whole $45,000 to the credit of the Cook-co. National Bank. After I had made the loan and deposited the proceeds to the credit of the Cook-co. National Bank, I reported that fact to Allen, Stephens & Co. It was to Mr. Stephens of that firm that I reported to; he said nothing and made no objection. I was at that

67 time a director in the German-American Bank. The German-American Bank knew that the Cook-county National Bank had failed, & I knew it, and it was a matter of public notoriety. This note of Allen, endorsed by me, when the surplus was applied to its payment, was past due, and it had not been paid, & the bank had sold collaterals and bought them in, and all they surrendered was the note past due and unpaid.

Q. Then was it not the understanding between you and Blennerhasset at the time you took these notes for discount to the German-American Bank that they were to be discounted for the benefit of the Cook-county National Bank, and the proceed to be applied to the benefit of the Cook-county National Bank?

A. I had no such understanding with Blennerhasset.

Q. Didn't you so testify on your former examination in this case?

A. I don't think I did.

Q. In your former examination were not these questions asked you and these answers made by you? (Reading from stenogra-

68 pher's minutes:)

"Q. When Mr. Blennerhasset gave you these three particu-

lar Charter Oak notes, for what purpose did he hand them to you?

A. For the purpose of selling them.

Q. To whom were you to give the proceeds?

A. I was to use the money to the credit of the Cook-county National Bank.

Q. Was that the understanding between you and Blennerhasset at the time you got these notes?

A. Yes, sir; when I got them all."

A. I say the same thing now.

Q. That was correct, was it not?

A. Yes, sir.

Q. And you repeat it now?

A. Yes, sir.

By a juror:

Q. In whose name were both these notes made?

A. I sold two pieces of paper and took the cashier's check for it.

Q. In whose name did the $25,000 stand on the books of the bank?

A. In my own name.

On re-direct the witness Bowen further testified:

69 The call loan was made in my own name; at that time the Cook-county National Bank had an account with the German-American Bank; when I received money for Mr. Allen I sometimes used it as specially directed, otherwise I deposited it to the credit of the Cook-county National Bank; so far as my action was concerned there was no difference made between the individual money of B. F. Allen and the money of the Cook-county National Bank; whatever money I received on Mr. Allen's account I placed to the credit of the Cook-county National Bank in some bank in this city where they had an account; I made a nightly report to the Cook-county National Bank of whatever transactions I made here during the day, whether they were for Allen or for the bank; I ceased being a director of the German-American bank in 1876.

On re-cross-examination he testified:

I undoubtedly reported the deposit of the proceeds of these particular notes to the Cook-county National Bank.

MICHAEL T. READING, a witness called for defendant, testified:

Am the cashier of the defendant; been so since Feb'y, '76; this loan appears from our books to have been made Oct. 20, '74; I have examined the books of the Cook-county National Bank

70 at the time of the examination of Mr. Burley and made a correct transcript of those parts referred to and that relate to this matter; from those copies I am able to state that on general ledger B, p. 811, there is an account with Allen, Stephens & Co.; on 23 Nov., '74, there is a credit to Allen, Stephens & Co. in these words: "By paper by Bowen, $29,463.34;" in individual ledger B, p. 4, there is an account headed B. F. Allen, and on the 23d Nov. '74,

there is a charge in these words: "To paper by Bowen, $29,463.-34;" in individual ledger B, p 4, there is an account headed B. F. Allen; on the 10th of Dec., 1874, there is a credit to B. F. Allen as follows: "By credit to correct error of charge 11–13, $29,463.34," and on general ledger B, p. 811, there is an account headed Allen, Stephens & Co.; on the same date, Dec. 10th, 1874, there appears a charge to Allen, Stephens & Co. in these words: "To charge to correct error of credit 11–13, $29,463.34."

On cross-examination witness testified:

71 I found some other entries in regard to that $29,463.34. They appeared to have been made after January 18th, after failure of the bank.

State what those entries were?

(Defendant objected. The question was not allowed, and the plaintiff excepted.)

The result of the charges I have mentioned are that one charges off the other, and it virtually leaves the bank account with no charge in regard to these notes. The credit to Allen, Stephens & Co. on the 23d November is taken away. The debit to Allen on the same day is taken away, and these other entries are taken away. They are all washed out.

The defendant rested.

The court thereupon charged the jury as follows:

The case resolves itself into a single question, and that is whether the notes, the proceeds of which were, about the 20th of February, in the possession of the defendant, were the notes of the Cook-county National Bank, so that the proceeds belonged to that bank, or whether the notes and the proceeds were the property

72 of some one else. If the Cook-county National Bank was entitled to the proceeds, the defendant, having been notified through the letter of Allen, Stephens & Co. of the fact, at the time it received the proceeds, was bound to hold those proceeds for the benefit of the Cook-county National Bank, and the plaintiff, its receiver, has succeeded to the right of the bank in that behalf.

Now the plaintiff relies upon the testimony of Mr. Blennerhasset, of the firm of Allen, Stephens & Co., upon the written evidence, the memorandum made at the time or about the time of the transactions by Allen, Stephens & Co., and transmitted to the Cook-county National Bank, and the entries upon the books of the Cook-county National Bank, to show that the three notes out of which this controversy springs were delivered by Mr. Blennerhasset to Mr. Bowen for the use of the Cook-county National Bank. I shall not refer in any detail to the testimony of the witnesses.

You will recall the testimony of Mr. Blennerhasset. You will recall the fact that about a month thereafter he transmitted on

73 behalf of the firm of Allen, Stephens & Co., to the Cook-county National Bank this memorandum of sale which has been exhibited, and which at the time contained an indorsement in the writing of one of the firm, "Bowen reports

the paper at $30,000 to the German-American Bank as collateral to call loan to you." Three days thereafter, on the 23d of November, it appears by the books of the bank that Allen, Stephens & Co. were credited with the proceeds of that paper, and on the same day Mr. Allen, the president of the bank, was charged with the same. More than this. In the statement of account which was transmitted by Allen, Stephens & Co. to the bank, the account covering the period from the first of October, if I remember right, to the 30th of November, the bank was charged with this paper, and that statement was found by the receiver among the other papers of the bank when he took possession of its assets. And it appears in addition to this that the proceeds of the call loan to which the notes were pledged as
74 collateral, were deposited in the First National Bank of this city to the credit of the Cook-county National Bank of Chicago, and that is substantially the plaintiffs' case; though, perhaps, I should refer to the testimony of Mr. Allen taken upon deposition, which has been read to you, wherein, although at first he was of the opinion that this loan was made, and consequently that the notes were negotiated for his individual benefit, yet upon subsequent reflection he concluded that the transaction was a transaction of the Cook-county National Bank, and he bases this conclusion in great measure, if not wholly, upon the fact, as he states it to be, that he never received the avails of the paper, that is, of the call loan, and never gave any instruction to Mr. Bowen in regard to the disposition of the same; and as to this it is proper that I should remark here, that he is contradicted by Mr. Bowen, the latter having testified that he did receive explicit instructions and
75 acted upon them.

Now, what is the case on the part of the defendant? Mr. Bowen is placed upon the stand, and it is insisted that it is fairly to be inferred from his evidence that he and Mr. Blennerhasset understood when the notes were given to Mr. Bowen to be used, that the transaction was a transaction between the firm and Mr. Allen individually; and it is insisted that although the proceeds were credited to the bank, still that was in pursuance of the general directions & of course of business between Bowen & Allen by which all proceeds, though arising from Allen's individual transactions and belonging to him, were deposited to the credit of the Cook-county National Bank in the various deposit banks here in which that bank kept an account, unless special directions were given by Allen. But I am not going to comment at all on Bowen's testimony. Counsel on both sides have alluded to it fully. The evidence
76 upon which the defendant mainly relies, is that to be *to be* found in the entries on the books of the bank on the 23d of November, and defendant insists that inasmuch as this paper was charged to Allen, president, on the books of the bank, on the 23rd of November, that shows a transfer of the paper to Allen at that time, and it is evidence which authorizes you gentlemen to indulge

in that conclusion; and of course if Allen acquired the title to this property, unless it was by some process it was transferred to the Cook-county National Bank prior to the time when these proceeds were appropriated by the defendant, then the plaintiff cannot recover, because if the Cook-county National Bank owned this paper on the 23rd day of November, 1874, it had a right to transfer the paper to Allen. Now, does the charge upon the ledger and journal in regard to that paper satisfy you that it was the intention of the bank to transfer it to Mr. Allen? But the case does not rest here, because we find that on the 10th day of December other entries were made on the books of the bank by which Allen was *credited*
77 with the proceeds of that paper to correct error. Allen, Stephens & Co. were charged with it to correct error. What, now, is the effect of those entries? You are to interpret them and say what they mean. If the bank had acquired title to this paper they could not transfer it back again to Allen, Stephens & Co. without their consent. They could transfer it to Allen, and after having transferred it to Allen, as between the bank and Allen they could rescind that action if they saw fit. Was that the effect and intent of the transaction which is evidenced by the entries on the books, or are you to interpret the entries as meaning that from the beginning to the end the bank repudiates any connection with the purchase of this paper and with the title?

Gentlemen, this is all there is in the case which I deem it important to submit to you. The case presents entirely a question of fact. If the proceeds of this paper belonged to the Cook-county National Bank, the defendant was not justified in appropriating it to the account of any one else, and the plaintiff is entitled
78 to maintain this action. It is my duty to instruct you that the plaintiff has the affirmative of this issue, and it is incumbent upon the plaintiff to satisfy you by a fair preponderance of the evidence that he is right upon this issue. If the plaintiff has done this he is entitled to a verdict at your hands.

The jury found a verdict for the defendant.

The plaintiff moved for a new trial upon the evidence and on the case as made; the motion was denied and the plaintiff duly excepted.

We consent to the foregoing bill of exceptions.

EDWARD SALOMON,
For Defendant.

CHAS. E. WHITEHEAD.
Att'y for Plaintiff.

And now this 18th day of May, 1881, the undersigned, the judge before whom this action was tried, has settled the foregoing bill of exceptions and signed the same.

79 WM. J. WALLACE,
District Judge.

Exhibit A.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *February* 1, 1875.

Notice having been received by me that "The Cook-county National Bank of Chicago," a national banking association formed pursuant to the laws of the United States, and located in the city of Chicago, had failed to redeem its circulating notes when payment thereof was legally demanded at the office of said association, and being satisfied from the protest of one of the circulating notes of the said association produced to me, amounting to five dollars ($5), and from the report of J. D. Harvey, a special agent appointed with the concurrence of the secretary of the treasury to ascertain whether such association has refused to pay its circulating notes in lawful money of the United States when demanded;
80 that the said association has refused to redeem in lawful money of the United States its circulating notes when payment thereof was legally demanded during the usual hours of business at the office of said association, and is in default:

Now, therefore, I, John Jay Knox, comptroller of the currency, in pursuance of the power and authority vested in me by law, do hereby appoint A. H. Burley receiver of "The Cook-county National Bank of Chicago," with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the act entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3d, 1874.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the city of Washington, in the district of Columbia, the day and year first above written.

JNO. JAY KNOX,
Comptroller of the Currency.

81 *Exhibit B.*

Herewith we hand you your account for the month. Please examine it and confirm.

Cook-co. Nat. Bank in account current with Allen, Stephens & Co. New York.

DR.

Oct.	1	Cash advanced		$30,000 00
	19	.....do		40,000 00
	24	Cash on d'fts 22 Oct		65,000 00
	24	Cash advanced		46,000 00
	27	.....do		37,000 00
	30	Disc't at Am. Exch. Bank		431 90
	2	Cash advanced		21,000 00
	6	Paper given for use		200,000 00
	6	Cash advanced		30,000 00
	9	.....do		10,000 00
	10	.....do		15,000 00
	12	.....do		5,000 00
	13	Dep. with First Nat. Bank		42,000 00
	16	.....do		10,000 00
		Cash advanced		20,000 00
	17	D'ft of B. F. Allen on First Nat. Bank		20,000 00
	18	Dep. in Nassau B'k		10,000 00
		Dep. in First Nat. B'k		50,000 00
		Disc't at Continental		101 18
	19	10 M. Ch. O. Life Ins. paper		10,000 00
		Less on 20 M. first m't'ge Mo. Pac		840 00
		Transf'd by wire and through Bank Montreal		5,000 00
	20	30 Ch. O. Life paper	$30,000 00	
		Less disc't at 7 per cent	536 66	
				29,463 34
		Dep't in First Nat. B'k		37,000 00
		Remit by wire through B'k Montreal		10,000 00
		10 M. Ch. O. Life paper		10,000 00
	21	Paid d'fts on First Nat. Bank	$12,371 40	
		Night mess	62	
		Night mess., Chic	1 26	
				12,373 28
	23	Paid d'fts on First Nat. B'k		46,640 56
	24	Paid d'fts on First Nat. B'k and Am. Exch. B'k		56,317 43
		Cost send two paper circular		200 00
	25	D'fts on First Nat. and Am. Exch. Bank		44,459 10
		Send one paper circular		100 00
	27	D'fts on Am. Exch. and First Nat. Bank		98,306 91
	28	.....do		25,252 25
82				
Nov.	30	D'fts Am. Exch. and First Nat. B'k		14,259 23
Dec.	1	.....do		52,120 07
		Int. Oct. balances		459 64
		Int. Nov. balances		2,178 40
Nov.	30	Sunday teleg. by Mr. Stephens		10 10
				$1,151,513 39
Dec.	1	Balance		620,539 46

83

CR.

Oct.	24	Dep't by C. T. Bowen		$20,000 00
Nov.	6	Proceeds of paper at Am. Exch. B'k		101,220 82
	7	Dep't by C. T. Bowen		25,000 00
		Note of B. F. M. & Co. Oct. 26, 90 days, due Jan. 27, '75	$10,000 00	
		80 days at 8 per cent	182 22	
				9,817 78
	9	Notes of B. F. M. & Co	$20,000 00	
		Less int. at 8 per cent	233 32	
			$19,766 68	
		Dep't by C. T. Bowen	5,000 00	
		Notes B. F. M. & Co., less 120 days at 8 per cent	9,733 34	
				34,500 02
	10	Notes B. F. M. & Co	$5,000 00	
		123 days at 8 per cent	136 67	
				4,863 33
	11	Note B. F. M. & Co	$5,000 00	
		123 days at 8 per cent	136 67	
				4,863 33
	12	2 notes B. F. M. & Co	$10,000 00	
		326 days at 8 per cent	257 77	
				9,742 23
	13	Rec'd per B. F. Allen		425 00
	14	.....do		20,000 00
		Note B. F. M. & Co	$5,000 00	
		115 days at 8 per cent	127 78	
				4,872 22
	16	Note B. F. M. & Co	$5,000 00	
		116 days at 8 per cent	128 89	
				4,871 11
		Dep't by B. F. Allen		17,000 00
		.....do		25,000 00
	19	Proc'd Ch. Oak Life paper, due March 3, 1875	$10,000 00	
		105 at 8 per cent	233 33	
			$9,766 67	
		Less com	25 00	
				9,741 67
	20	Proceed Ch. Oak Life Ins. paper, due March 3	$10,000 00	
		103 days at 8 per cent	228 89	
			$9,771 11	
		Less com	25 00	
				9,746 11
	2	Note B. F. M. & Co., due M'ch 20, '75	$10,000 00	
		120 at 8 per cent	266 67	
				9,733 33
	21	Letter 19 Nov		21,304 01
	23	Letter 20 Nov	$33,706 46	
		Letter 21 Nov	28,138 80	
				61,845 26
	25	Letter 23 Nov		22,084 26
	27	Letter 24 Nov	$8,554 30	
		Letter 25 Nov	13,710 89	
				22,265 19
	28	Oakford & Co	$1,399 50	
		Jenkens & Co	1,399 50	
				2,799 00

CR.—Continued.

		Note B. F. M. & Co.		$5,000 00	
		119 days at 8 per cent		132 21	
					$4,867 79
		Note B. F. M. & Co.		$5,000 00	
		119 days at 9 per cent		144 75	
					4,855 25
		Note Nott & Co.		$5,000 00	
		38 days at 8 per cent		96 65	
				$4,903 35	
		Less com.		25 00	
					4,878 35
		Accept. A. McDonald			15,000 00
		Call, S. V. White			20,000 00
84]	30	Jenkins & Co.		$5,316 88	
		Letter 27 Nov.		10,891 16	
		Letter 28 Nov.		14,739 83	
		Note B. F. M. & Co., less 122 days at 8 per cent		4,865 56	
					35,813 43
Dec.	1	Note B. F. M. & Co., due 2 Ap'l, '75		$5,000 00	
		121 days at 8 per cent		135 56	
				$4,864 44	
		Less com. on 100 M. paper, B. F. M. & Co.		1,000 00	
					3,864 44
		Balance			620,537 46
					$1,151,513 39

85 [Endorsed:] U. S. circuit court, southern district of N. Y.; Augustus H. Burley, receiver, &c., against The German-American Bank; bill of exceptions; Chas. E. Whitehead, attorney for pl'ff, appellant, 61 Wall st., N. Y. city; U. S. circuit court; filed May 20, 1881; Joseph M. Deuel, clerk.

86 *Bond for Damages and Costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

Augustus H. Burley, receiver,
vs.
The German-American Bank.

Know all men by these presents, that we, Homer H. Stuart and Charles E. Whitehead, both of the city of New York, are held and firmly bound unto the above-named the German-American Bank in the sum of five hundred dollars, to be paid to the said the German-American Bank, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the first day of June, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-named Augustus H. Burley, receiver, has

prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court for the southern district of New York:

Now, therefore, the conditon of this obligation is such, that if the above-named Augustus H. Burley shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HOMER H. STUART. [L. S.]
CHAS. E. WHITEHEAD. [L. S.]

Sealed and delivered and taken and acknowledged this 16th day of June, 1881, before me.

[L. S.] INGLIS STUART,
Notary Public, New York city.

87 UNITED STATES OF AMERICA, } *ss.*
Southern district of New York, }

Homer H. Stuart and Charles E. Whitehead, each being duly sworn, doth depose and say, each for himself, that he is a householder in the state of New York; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

HOMER H. STUART.
CHAS. E. WHITEHEAD.

Sworn to this sixteenth day of June, A. D. 1881, before me.

[L S.] INGLIS STUART.
Notary Public, New York city.

The foregoing bond is approved June 18th, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

[Endorsed:] U. S. circuit court; Augustus H. Burley, receiver, *vs.* The German-American Bank; bond for damages and costs on Chas. E. Whitehead, proctor; U. S. circuit court; filed June 18, 1881; Joseph M. Deuel, clerk.

88 UNITED STATES OF AMERICA, *ss.*

To the German-American Bank, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Augustus H. Burley, receiver of the Cook-county National Bank, is plaintiff in error, and you are defendant in error, to show

cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated June 18th, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

89 [Endorsed:] U. S. supreme court; Augustus H. Burley, receiver, plaintiff in error, against The German-American Bank, defendant in error; citation; I admit due service of the within citation June 21st, 1881; Edward Salomon, att'y for defendant in error; rec'd June 21st, 1881; U. S. circuit court; filed June 23, 1881; Joseph M. Deuel, clerk.

90 Supreme court of the United States.

Augustus H. Burley, receiver of the Cook-county National Bank, plaintiff in error,
against
The German-American Bank, defendant in error.

And afterwards, to wit, on the second Monday of October, 1881, before the justices of the supreme court of the United States, at the capitol, in the city of Washington, comes the German-American Bank, defendant in error, by its attorney, Edward Salomon, and says that there is no error, either in the record or proceedings aforesaid, in manner and form as assigned by the plaintiff in error aforesaid, or in the giving of the judgment aforesaid, and prays that the record and proceedings aforesaid be examined, and that the judgment aforesaid, in form aforesaid, may be in all things affirmed, &c.

Dated New York, October 8th, 1881.

EDWARD SALOMON,
Attorney for defendant in error,
115 *Broadway, New York city.*

[Endorsed:] U. S. supreme court; Augustus H. Burley, &c., *vs.* The German-American Bank; joinder in error; Edward Salomon, att'y for def't in error, 115 B'way, N. Y. city.

[Endorsed:] Supreme court, United States; 1881, October term; No. 888; A. H. Burley, rec'r, &c., pl'ff in error, *vs.* The German-American Bank; joinder in error; filed 10th Oct'r, 1881; office supreme court, U. S.; filed Oct. 10, 1881; James H. McKenney, clerk.

[Endorsement on cover:] S. New York, C. C. U. S.; No. 283; Augustus H. Burley, receiver of the Cook-county National Bank, plaintiff in error, *vs.* The German-American Bank; filed 29th August, 1881; 90 pages.

111-216

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

AUGUSTUS H. BURLEY, RECEIVER OF
COOK COUNTY NATIONAL BANK,

vs.

THE GERMAN AMERICAN BANK.

BRIEF AND ARGUMENT FOR APPELLANT.

L. H. BISBEE,
J. S. POLK,
Attorneys for Appellant.

CHICAGO:
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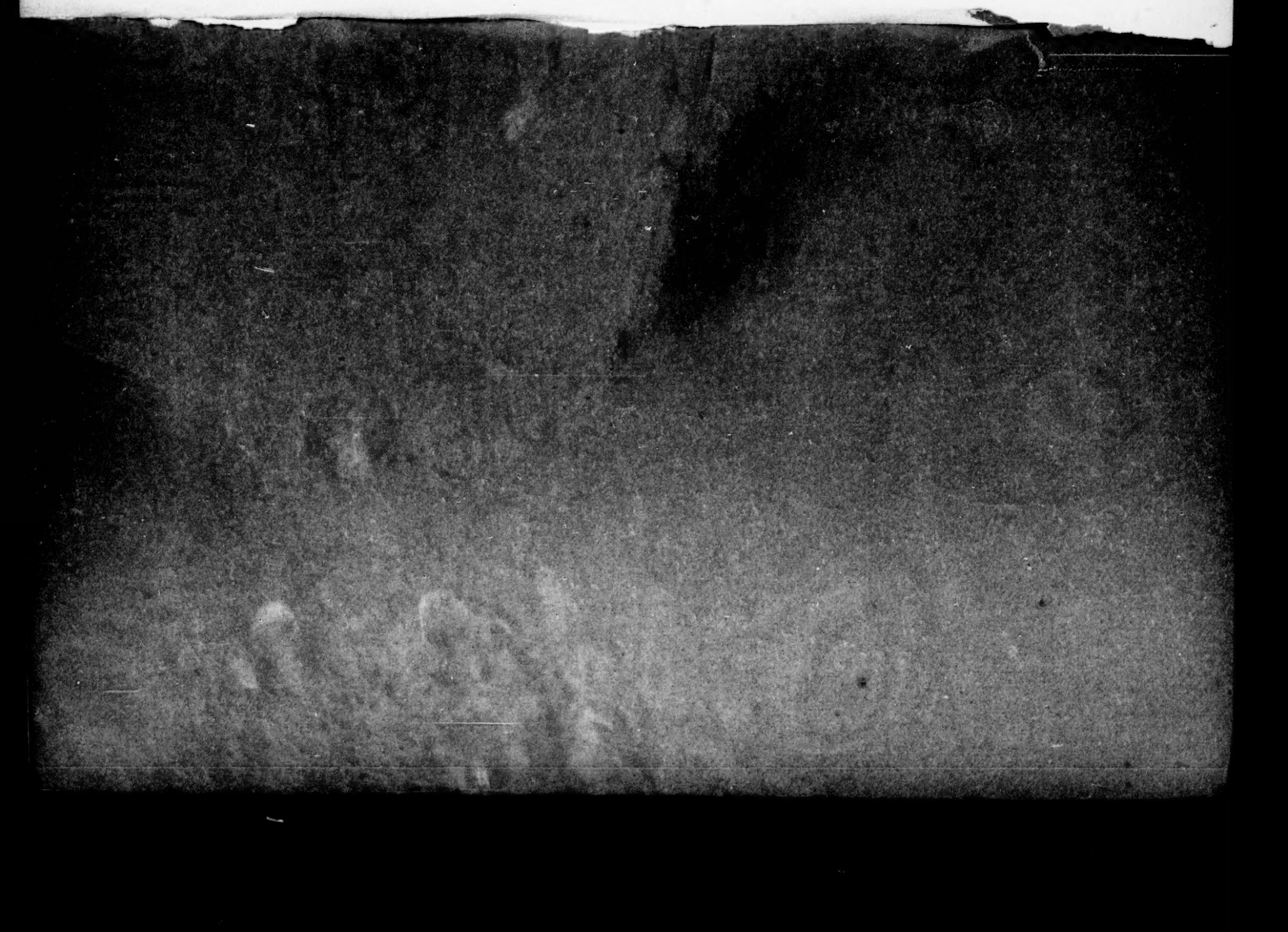
1884.



IN THE

Supreme Court of the United States.

AUGUSTUS H. BURLEY, RECEIVER OF COOK COUNTY NATIONAL BANK.

vs.

THE GERMAN AMERICAN BANK.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT OF FACTS.

The Cook County National Bank was formerly a corporation doing business at Chicago, in the State of Illinois. On the 1st day of February, 1875, it was put into liquidation, and the plaintiff, A. H. Burley, was duly appointed the receiver thereof. The above entitled suit was commenced in the Court of Common Pleas for the city and county of New York, on the 4th day June, 1875. (Transcript, pp. 2-3).

The complaint alleges, as a cause of action, that on the 20th day of February, 1875, the defendant, German American Bank, was a corporation doing business in the City of New York, and as such, that it held three certain promissory notes of the Charter Oak Life Insurance Company, for the sum of ten thousand dollars each; that these notes were on that day the property of the plaintiff, as receiver of the Cook County National Bank, and were held by defendant only as collateral security for a call loan of twenty-five thousand dollars; that on the said 20th day of February, 1875, the three notes were paid in full by the Charter Oak Life Insurance Company, whereby the call loan was not only paid, but a balance of about five thousand dollars remained, which belonged to the plaintiff as receiver; that the defendant had received notice of plaintiffs' ownership prior to the time of payment, and that payment of the balance had been demanded and refused. (Transcript, p. 3.)

By way of defense, the defendants answered, on information and belief, that the three ten thousand dollar notes of the Charter Oak Life Insurance Company had been delivered to them on the 24th day of October, 1874, by one Chauncey T. Bowen, as collateral security for a call loan to him of $25,000; that the notes were negotiable, and not then due, and belonged to the said Chauncey T. Bowen, who had the legal title thereto, and was the owner thereof; that the notes were paid at maturity, and the

proceeds applied to the payment of the loan and interest; that believing the balance in their hands belonged to the said Bowen, upon his order and direction, the defendants thereafter applied it towards the payment of certain other promissory notes then held by them, and upon which the said Bowen was liable as indorser.

By way of a second defense, the answer further sets forth the substance of an alleged agreement in writing between the defendants and the said Chauncey T. Bowen, entered into by them on the 31st day of August, 1871. The answer avers that by the terms of this agreement Chauncey T. Bowen promised and agreed to and with the defendants "that all securities, bonds, stocks, things in action, or other property or evidence of property, which then had been, or might at any time thereafter be," left with the defendants by the said Bowen, or for his account, "whether specifically pledged or not, might be held by the defendants, and should be deemed to be, and were thereby, pledged as security for the payment of any sum or sums of money which had been, or might thereafter be, loaned, paid or advanced" to the said Bowen or for his account by the defendants; that at the time of the deposit of the three notes of the Charter Oak Life Insurance Company with defendants, as collateral security for the said call loan to the said Bowen of $25,000, the alleged agreement was then a "continuing and existing promise;" and that it

was a collateral security not only for the said loan of $25,000, but also for "the payment of any and all other indebtedness, liability or engagement, on the part of said Bowen to said defendants, then existing, or which might at any time thereafter exist." In conclusion the answer alleges in substance, that prior to the 20th day of February, 1875, the said Bowen had become liable to the defendants, as indorser of certain promissory notes other than those made by the Charter Oak Life Insurance Company, for sums of money aggregating more than the balance of $4,455.56; that this liability of Bowen existed on the said 20th day of February, 1875, at which time, pursuant to the said agreement with said Bowen, "and upon his special direction and request, the said balance of $4,455.56 was applied toward the payment of said last mentioned liability." And finally, that during all the time when the three Charter Oak Life Insurance Company notes were deposited by Bowen, as well as when his liability as endorser was created, and the balance of $4,455.56 came into the possession of the defendants, they "believed, and had good reason to believe, and had no notice to the contrary from the plaintiff, that the said Charter Oak notes were the property of said Bowen." (Transcript pp. 4-5.)

In addition to this affirmative statement of facts, the answer sets forth what is intended for a general denial, in the following terms: "Except as hereinbefore stated or admitted, these defendants, on in-

formation and belief, deny each and every allegation in the said complaint contained." (Transcript, p. 4.)

Issue was joined upon these pleadings. The case having been removed to the United States Circuit Court for the Southern District of New York, it was tried before Justice Wallace and a jury on the 9th day of December, 1880. The result was a verdict for defendant, upon which a judgment was duly rendered, and from which the plaintiff has taken this appeal. (Transcript, pp. 14, 15.)

The undisputed facts, as developed by the evidence, are as follows: Chauncey T. Bowen was a director in the Cook County National Bank, and its authorized agent in the city of New York. He was at the same time a director in the German American Bank, defendant. Allen, Stevens & Co., were a private banking house doing business at No. 25 Pine St., in the city of New York. The members of this firm were Benjamin F. Allen, William A. Stevens and Herman Blennerhasset. Benjamin F. Allen was at the same time president of the Cook County National Bank. (Transcript, pp. 14, 15.) During the month of October, 1874, Allen, Stevens & Co. were in possession of three promissory notes, each for the sum of $10,000, made by the Charter Oak Life Insurance Company, endorsed by J. C. Walkley, and due in February, 1875. The three notes in controversy were of a number given by the Charter Oak Life Insurance Company to Allen, Stevens & Co., to the

amount of $150,000, to pay a debt due them from the Charter Oak Company. (Transcript, pp. 14, 15.) Chauncey T. Bowen had previously sold all of the Charter Oak notes for Allen, Stevens & Co., excepting the three ten thousand dollar notes, which he had pledged with the German American Bank, as collateral security for the said call loan of $25,000. (Transcript, p. 21.) The proceeds of this loan Bowen placed to the credit of the Cook County National Bank, in the First National Bank of New York City. It may be inferred from the testimony, that Bowen had placed to the credit of the Cook County National Bank nearly if not quite all the proceeds realized from the sale of Charter Oak notes. (Transcript, p. 21.)

Blennerhasset testified that the three Charter Oak notes for ten thousand dollars each, which had been pledged as aforesaid, and the subject of controversy were originally given to Bowen for the account of Allen, Stevens & Co., but that the firm subsequently gave Bowen their consent that the notes should be used for the Cook County National Bank. (Transcript, p. 14). That Allen, Stevens & Co. made a bill to the Cook County National Bank for the three notes in question and charged the Cook County National Bank with those notes and rendered to that institution an account of the same at the time, seems to be undisputed, as is also the fact that on 25th day of February, 1875, and while the notes in question were awaiting payment at the office of

Allen, Stevens & Co., in New York city, the German American Bank was notified by Mr. Blennerhasset that the three notes endorsed by J. C. Walkley, and not by B. F. Allen, were never the property of Chauncey T. Bowen, and that the surplus remaining after payment of the $25,000 loan, should be credited to the Cook County National Bank. (Transcript, pp. 14, 16, 24, 25).

As to the testimony of Bowen on this subject, and the facts deduced from the books of the Cook County National Bank, the learned court are respectfully referred to the charge of Judge Wallace, (Transcript, pp. 25, 26.) The three notes were paid at maturity by the Charter Oak Life Insurance Co. The Cook County National Bank was put into liquidation on the 1st day of February, 1875; and the plaintiff, Burley, was on that day appointed receiver (Transcript, p. 3.)

THE APPELLANTS ASSIGN THE FOLLOWING ERRORS:

1. The Circuit Court erred in holding, that under the answer, the question at issue was, whether the notes in question belonged to the Cook County National Bank on the 20th day of February, 1875, or whether they *were the property of some one else.* (Transcript, p. 24.)

2. The court below erred in permitting the counsel for defendant, in his cross-examination of Her-

man Blennerhasset, to enquire into the personal affairs of B. F. Allen, with Allen, Stevens & Co., and with the Cook County National Bank, or in permitting under such cross-examination, any testimony tending to show that B. F. Allen owned the notes, and not Chauncey T. Bowen. Such portions of the cross-examination of Blennerhasset as are deemed objectionable and erroneous by appellant, are to be found on page 15 of the transcript of record and may be particularized as follows:

"Allen gave a mortgage to our firm upon all his "real estate to secure our firm for the balance due "us from the Cook County National Bank for ad- "vances past and future It was made 18th Novem- "ber, 1874." "November 20th, 1874, the indebted- "ness of the Cook County National Bank was over "$300,000 to us; the mortgages had been given pre- "vious to that date. These Charter Oak notes were "not procured by Mr. Allen on his individual ac- "count—none of them. * * * None of these "notes were charged to Allen's individual account. " * * * * * Bowen discounted—that is, sold— "none of these notes for B. F. Allen. I didn't tell "Bowen that these notes belonged to B. F. Allen, "and that he was to discount them for B. F. Allen."

3. The Circuit Court erred in permitting Chauncey T. Bowen, as a witness for defendants under their answer, to testify to his transactions as an agent of B. F. Allen, or to allow the said Bowen to enter at all into the individual transactions between

himself and Allen. It was error, also, for the court below, under the defendants' answer, to allow Bowen to testify to any facts showing, or tending to show, that the title to the three $10,000 notes in controversy was in any other person than himself on the 20th day of October, 1874; or that the balance of $4,455.56 remaining with the German American Bank on the 20th day of February, 1875, belonged to any person other than the said Chauncey T. Bowen. To specify those parts deemed to be error (Transcript, pp. 20–21):

"B. F. Allen was a private banker at Des Moines, "and dealt in all kinds of securities—a general "speculator. He was a senior member of Allen, "Stephens & Co., and President of the Cook County "National Bank."

"What was the nature of Mr. Allen's individual "transactions that you did for him in the summer "and fall of 1874?"

A. "I made purchases and sales of stocks, and "made loans and collections for him in New York "and Chicago."

Q. "If you collected money for him in the City "of New York, what did you do with it?"

A. "Placed it to the credit of the Cook County "National Bank."

"In 1874, Mr. Blennerhassett, of Allen, Stephens & Co., handed me some three or four hundred "thousand dollars of Charter Oak Life Insurance "Company notes."

Q. "What did he tell you?"

A. "He said that Mr. Allen was to make a loan."

Q. "When these notes were first placed in your "hands, was anything said by Mr. Blennerhasset to "you in relation to the origin and purposes of the "notes?"

A. "Yes; Mr. Blennerhasset stated that they "were trying, and had perfected a loan with the "Charter Oak Life Insurance Company for Mr. Allen, "and that these notes were given in anticipation of "their receipts—the Charter Oak Company receipts "—as they did not at that time have that amount of "money to spare, and they had issued this paper at "four months time."

Q. "State, if anything, what Mr. Allen said, or "whether he gave you any directions in relation "to the use of this surplus?"

A. "Mr. Allen told me to appropriate the sur- "plus, some $4,500, upon a note of his at the Ger- 'man American Bank for $20,000 on a call loan, "made in July previous to this. I had made the "loan and indorsed the note, Allen's note, with "some collaterals. The collaterals were sold. I "directed in April the application of this surplus "toward the payment of that note of Allen's with "my indorsement."

(Transcript, pp. 20, 21, 22.)

4. The circuit judge erred in not overruling the objection interposed by defendants' counsel to the following evidence of Mr. Burley. (Transcript, p. 17.)

Q. "What other entries in regard to this matter "do you find in the books of said bank?"

A. "In the journal to the general ledger, on "page 71, under date of June 25th, 1875, Allen, "Stephens & Co. are credited with C. O. paper used "at the German, $29,463.34, and interest account is "credited with $536.66 C. O. paper. On page 72 of "the same ledger, on the same date, bills receivable "are charged with C. O. paper at German, $30,000.

"On the same page of the same ledger the Ger- "man is credited at the same date with 'call loan,' "October 20th, $25,000 interest; right under it, Oc- "tober 20th, to February 23d, $612.50.

"Same date and page bills receivable have 'credit "'C. O. paper, $30,000.' Loan account is debited the "German, Oct. 20, $25,000. Interest account is deb- "ited 'ditto,' $612.50, the meaning of which entries "is that Allen, Stephens & Co. are credited with "$30,000 of Charter Oak paper, less the discount "upon the same of $536.66, which amount is credit- "ed to interest account; that the $30,000 represent- "ed by these figures is charged to bills receivable as "'C. O. paper at German.' Bills receivable are "credited with $30,000. German American Bank "is charged with $30,000. German American Bank "is credited with a call loan of $25,000, and interest "upon it of $612.50. Loan account is indebted with "a call loan of $25,000, and interest account is deb- "ited with interest $612.50."

PROPOSITIONS.

I.

Under the answer in this case, the issue presented was not whether the three ten thousand dollar notes made by the Charter Oak Life Insurance Company, and indorsed by J. C. Walkley, belonged to the Cook County National Bank, or were *the property of some one else*, as stated by the learned circuit judge. The issue as raised by the pleadings was, were these notes property of the Cook County National Bank, *or of Chauncey T. Bowen.*

II.

The *special traverse* raised by the answer being the one set forth above, all evidence tending to show a title in some person other than either the Cook County National Bank, or Chauncey T. Bowen should have been excluded.

III.

Such portions of the cross-examination of Mr. Blennerhasset, as are specifically mentioned in the assignment of error, should have been excluded as not responding to anything elicited by the direct examination, and as being irrelevant and incompetent under the issues. (Transcript, pp. 14, 15.)

ARGUMENT.

This action was commenced under the system of "Reformed American Procedure." The pleadings were drafted under the New York Code of Procedure, and are subject to the *rationale* of that system. The spirit of common law pleadings are certain arbitrary and general forms, while that of the reformed or code procedure is a system of special and natural statement.

The first is a method of *general* issues, the second a scheme of *special* issues. The complaint should aver only the material facts which constitute the ground of relief, while the answer must either generally or specially deny each and every material allegation of the complaint, or set forth new matter by way of affirmative relief. In no event, is argumentative matter to be employed, nor should the pleading attempt to draw inferences as to the legal effect or aspect of the alleged facts. Under the reformed procedure, the general or special denials are not so broad as the general issues of the common law most in use, and the verification required by the code cuts off all averment of fictitious defenses. Under the common law system, in course of time, the manifestly false and illogical practice was developed, both under the plea of *nil debit* and *non assumpsit*, of allowing evidence of various defenses which *admitted* all the essential facts stated in the declaration, but avoided their

effect by ~~pleading~~ proving matter subsequent in time to the original transaction, such as payment, accord and satisfaction, arbitrament, release, &c. In their consequences, these errors proved subversive of some of the main objects of pleading. They led to surprises upon the trial, or to an unnecessary extent of preparation. So after centuries of experience, England found it most conducive to justice to require the parties virtually to apprise each other of the *precise grounds* upon which they intended to rely. This was effected by the Act of 3rd and 4th, William 4th, Ch. 42, § 1, and the rules adopted by the English judges at Hiliary term in 1834. These rules endeavored to restore pleading to its original logical simplicity by *first*, abrogating the plea *nil debit*, and *second*, by providing in substance that the plea of *non assumpsit* should operate where the promise was express, as a denial of the promise, and where it was implied, of the matters of fact upon which the promise was founded. The New York Code of Procedure was conceived in the same spirit. It was evidently designed as the characteristic *genius* of code pleading, that in all cases the complaint should aver a plain and distinct statement of the facts intended to be proved, while the answer was to either generally deny each and every material allegation of the complaint, or specifically deny some one or more of them, or doing neither of these things, plead some new matter by way of "confession and avoidance." The answer can not be at the same

time a general and special denial; neither can it at one and the same time deny and confess and avoid. In other words, the same answer must operate as a general denial, as a special denial, or it must allege new facts by way of an affimative defense.

McKyring v. *Bull*, 16 N. Y. 298.
People v. *Ryder*, 12 N. Y. 433.
Hill v. *Barrett*, 12 B. Monroe, 83.
Green v. *Palmer*, 15 Cal. 411.
Fitzsimmons v. *City Fire Ins. Co.*, 18 Wis. 234.
Traster v. *Snelson's Administrator*, 29 Ind. 96.
Sayer v. *Linkhart*, 25 Ind. 145.
Conger v. *Parker*, 29 Ind. 380.
Sanders v. *Sanders*, 39 Ind. 207.
Yancy v. *Teter*, 39 Ind. 305.
Summers v. *Vaughan*, 35 Ind. 323.
Jones v. *Frost*, 51 Ind. 69.
McMahon v. *Spinning*, 51 Ind. 187.
Peck v. *Parchin*, 52 Iowa, 46.

The answer of the defendants in the case at bar must be construed in the light of these conceded principles of code pleading. Judged by these principles in their logical rigor, the answer was demurrable. Strictly considered, it presents neither a general denial of the material facts set forth in the complaint, nor is the matter affirmatively stated proper by way of "confession and avoidance." In form, the answer is neither flesh nor fowl. But as it was not questioned at the proper time, it

must now be accepted as a traverse for what it is worth under the code system. It was undoubtedly intended by the pleader that the answer should raise both a general and a special traverse as to each and every material allegation of the complaint, not expressly excepted or admitted. But can it be rightfully said to do this? It can not be logically maintained that the answer is a *general* denial of the facts averred in the complaint, when it sets forth an array of special facts by way of a defense, and swears to them on information and *belief*. Nor can the answer be said to have pleaded matter in confession and avoidance of the allegations of the complaint. It does not admit the material facts of the complaint, but sets forth with elaborate particularity a statement of facts which should raise either a question of law, or else stand in absolute contradiction of the grounds of action averred by plaintiff. If it had been the intention of defendants to rely upon the fact that the title to the notes in controversy was *not* in the Cook County National Bank on the 20th day of October, 1874, and the 20th day of February, 1875, *but in some other person or persons*, they could have raised this precise issue by simply submitting a *general denial* to the complaint. Could this answer have been construed as simply a general denial of title in the Cook County National Bank, the defendants would have been at liberty to prove *anything* tending to show that allegations of plaintiff were untrue. Such facts support the general denial.

The plaintiff's allegations can not be true because of certain other facts which are inconsistent with them.

Shaus v. *The Manhattan Gas-light Company*, 36 N. Y. Superior Ct. 262.

Wheeler v. *Billinys*, 38 N. Y. 263.

Greenfield v. *Mass. Mut. Life Ins. Co.*, 47 N. Y. 430.

Youngs v. *Kent*, 46 N. Y. 672.

Allis v. *Leonard*, 46 N. Y. 688.

But we respectfully submit that, in justice to the plaintiff, and adhering to the essential science of code pleading, the answer of defendants can not be construed as a general denial of title in the Cook County National Bank. As has been indicated, all defenses under the code should be denials of either all, some or one of the plaintiff's allegations; or affirmative new matter which assumes that the allegations of the complaint or petition can not be disproved, but at the same time establishes other facts which defeat the right of action. The general denial should be a brief and comprehensive formula, denying "each and every allegation of the complainant"; while the special denial should be based upon and negative the particular averment or averments against which it is directed. It is utterly impossible, therefore, that a denial, either general or special, if properly framed, should contain any affirmative matter, any allegation of facts in a positive and direct manner, as

though they constituted new matter and a defense by way of confession and avoidance. A defense consisting in ~~the~~ a narrative of facts, stated under the form of "new matter," which were not "new matter," however, but could all be properly proved under a denial, would be a violation of the true theory of code pleading. Measured by these conclusions, the answer of the German American Bank is defective, as it does not in general terms deny the material averments of the complaint, nor does it specially deny any particular allegation or allegations; and assuredly the affirmative statement does not present matter that may be properly pleaded by way of confession and avoidance. But at this stage of the case, of course, the answer must be accepted at its value. The most that can be said of the answer, in its existing form, is, that although unscientific, yet it is to be accepted as a *special* plea or traverse of the allegation of title in the Cook County National Bank. In other words, the defendants must be taken to have *pleaded specially*, instead of pleading the *general issue or denial*. The answer sets forth a specific allegation of certain facts, which, if true, would be inconsistent with, or subversive of, the very origin of plaintiff's cause of action. The defendant has alleged and sworn to a specific narrative of facts by way of answer to the complaint, and his testimony should have been restrained within the limits of this special traverse. Those averments

of the answer which, taken by themselves, would probably operate as a general denial of title in the Cook County National Bank, should be construed as *qualified* and *explained* by the affirmative matter of that pleading.

Pomeroy on "Remedies and Remedial Rights," §§ 624, 626, 630–632.

Stephens on Pleading, pp. 161, 168, 169, 175–182.

Let us for a moment recur to that portion of the answer which was probably intended as a general denial of the allegation of title in the Cook County National Bank. It is in the following phrase:

"Except as hereinbefore stated or admitted, these defendants, on information and belief, deny each and every allegation in the said complaint contained."

(Transcript pp. 4, 6.)

Even standing by itself, unaccompanied by affirmative matter, or facts averred in special traverse, as a form of general denial, this phraseology has been criticised by the best authorities on this subject. True it is, that under peculiar circumstances words in a form somewhat similar have been held good as a general denial. Not that any tribunal of respectable authority has ever *approved* of this particular form; they have merely *tolerated* it in the interest of substantial justice, when, in juxtaposition with the remainder of the pleading, violence was not done to the essential spirit of code procedure.

Pomeroy on "Remedies and Remedial Rights," § 632.

Greenfield v. *Mass. Mut. Life Ins. Co.*, 47 N. Y. 430.

Youngs v. *Kent*, 46 N. Y. 672.

Allis v. *Leonard*, 46 N. Y. 688.

Schaus v. *Manhattan Gaslight Co.*, 36 N. Y. Superior Court, 263.

Wheeler v. *Billings*, 38 N. Y. 263.

Andrews v. *Bond*, 16 Barb. 633.

Beaty v. *Swarthout*, 32 Barb. 293.

Bond v. *Corbett*, 2 Minn. 248.

Caldwell v. *Brugerman*, 4 Minn. 270.

Wood v. *Ostram*, 29 Ind. 177.

Northrup v. *Miss. Valley Ins. Co.*, 47 Mo. 435, 443.

But it is safe to say that in none of these cases were the pleadings analogous to those now under consideration. A careful review will make manifest that in no single instance did the courts violate the distinctive character of code procedure as a system of *verified special pleading*. In many of the cases cited the answer contained but a general denial, while in several of them, in addition to this, certain averments of the complaint were admitted, qualified or explained. None of the answers were like the one of this record. They did not narrate certain facts by way of a special traverse of the cause of action alleged.

For example, in *Greenfield* v. *Mass. Mut. Life Ins.*

Co., the complainant admitted the non-payment of premiums due, but alleged that there was due upon said policy a certain sum, under a statute of Massachusetts, entitled the "Non-forfeiture Act." The answer admitted the incorporation of the company, and the making of the contract of insurance, but denied "each and every other allegation of the complaint." This was held to traverse the fact that anything was due upon the policy, under the provisions of the statute referred to in the complaint.

In *Andrews* v. *Bond*, under a general denial of the allegations in the complaint, the defendant was allowed to introduce certain evidence tending to controvert the facts which the plaintiff was bound to establish in order to sustain his action. In *Schaus* v. *Manhattan Gaslight Company*, the action was brought to recover damages alleged to have been sustained by plaintiff from water which entered plaintiff's cellar, as claimed by him, through the negligence of defendant in opening a ditch in front of plaintiff's premises for laying gas mains in the street. The defendant's answer was a general denial, and under it he was permitted to show that the water which caused the injury did not come from the ditch, but from a defective sewerage system in that part of the city.

In substance, the complaint in *Wheeler* v. *Billings* alleged that the defendant promised to pay the plaintiff twenty-five hundred dollars in consideration of the transfer of his interest in a certain

patent. The answer admitted the purchase, but alleged that the price was one thousand dollars, which had been paid. The court held that the answer traversed the consideration alleged by plaintiff, and the defendant was therefore allowed to prove, not only that the one thousand dollars had been paid, but that the remaining fifteen hundred dollars was payable only upon certain conditions which had not been performed by plaintiff.

In *Allis* v. *Leonard et al.*, the complaint alleged the making and delivery of a promissory note to the payee, and a subsequent sale and delivery thereof to plaintiff. The answer admitted the making and delivery of the note to payee, but denied "each and every other allegation of the complaint." Held that the sale and delivery to plaintiff was put in issue.

See *Weaver* v. *Borden*, 49 N. Y. 286.

The issues really and properly presented by the complaint and answer in the case at bar, may be stated thus:

1. On the 20th day of October, 1874, was the title in the three ten thousand dollar notes, made by the Charter Oak Life Insurance Co., and indorsed by J. C. Walkley, in the Cook County National Bank, or in Chauncey T. Bowen?

2. On the 20th day of February, 1875, did the balance of $4,455.56, remaining with the German American Bank, belong to the Cook County National Bank or to Chauncey T. Bowen?

Differently expressed, the complaint alleges that on the 20th day of February, 1875, the said three promissory notes were the property of plaintiff, Burley, as receiver of the Cook County National Bank.

No, say the defendants in their answer; these notes did not belong to the Cook County National Bank on that day, but to Chauncey T. Bowen. The answer then proceeds to minutely detail the circumstances under which the defendants obtained the notes from the said Bowen, *swearing* to them upon information and *belief*. This statement of facts is without logical force or legal meaning, unless intended by the defendants as a special traverse to the allegation of title in the plaintiff as receiver. Spreading them upon the record, the defendants must be taken to have said to both court and plaintiff: "Here are the particular facts upon which we rely as a defense to your claim in these notes." If such is not the case, then the main purpose of code pleading will have been thwarted; the plaintiff was misled, nay, even deceived, as to the real nature of the defense to be relied on. Thus again, would that anomaly in pleading repeat itself, what is intended to inform serves but to misinform;—the issue is not to be determined from the face of the pleadings, but from a fortuitous tendency at the trial.

Should this position commend itself to this learned court, then do we submit it as an indubitable conclusion that all of that testimony of the said Bowen relating to his transactions as the personal

agent of B. F. Allen, and particularized in the third assignment of error should have been excluded by the Circuit Judge; nor should the said Bowen have been allowed to enter at all into the individual transactions between himself and the said Allen. It was equally erroneous, also, for the court below to allow Bowen to testify to any facts tending to show that the title to the three ten thousand dollar notes in controversy was in some person other than Chauncey T. Bowen or the Cook County National Bank, or tending to show that the balance of $4,455-.66, remaining with the German American Bank on the 20th day of February, 1875, belonged to any other person than Chauncey T. Bowen.

The testimony upon which these strictures are offered is set forth with particularity in the third assignment of error, and to which the learned court is respectfully referred.

In support of the second assignment of error, it is not necessary to cite authorities before this learned court. That cross-examination should be confined within the subject-matter, elicited by the examination in chief, is grounded beyond controversy. Not only did the cross-examination of Mr. Blennerhasset clearly violate this salutary principle, but the matters set forth in the assignment are objectionable as irrelevant and incompetent under the issues.

The excluded testimony specified in the fourth assignment of error should have been received. It would have explained why the other entries in the books

were made, and in what position the books of the bank really stood at the time of the failure, and would show conclusively that these notes were the notes of the Cook County National Bank, and that they were entitled to the proceeds thereof.

The judgment should be reversed, and the cause remanded for a new trial.

L. H. BISBEE,
J. S. POLK,
Atty's for Appellant.

111-216

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.—NO. 283.

AUGUSTUS H. BURLEY, Receiver of the Cook County National Bank,

Plaintiff in Error,

vs.

THE GERMAN-AMERICAN BANK,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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the German-American Bank that Mr. Bowen never was the owner of those notes, and that the surplus which would remain after payment of his loan should be credited to the Cook County National Bank of Chicago.

The Cook County National Bank had failed and closed its doors January 18th, 1875, and February 1st, 1875, Augustus H. Burley, the plaintiff in error, was appointed its Receiver. This action was brought by him to recover this surplus, alleging that he, as Receiver of the Cook County National Bank, was the owner of the three notes at the time of their payment. The defendant denied this alleged ownership, and that question formed the only issue in the case when tried before Judge WALLACE and a jury in the United States Circuit Court for the Southern District of New York, December 9th, 1880. The jury rendered a verdict for the defendant.

It appeared in evidence at the trial that these three notes were a part of certain notes of the Charter Oak Life Insurance Company aggregating $300,000, received by Allen, Stephens & Co. and by them delivered to Bowen to be discounted. Bowen was at that time the agent in New York City of the Cook County National Bank and of Benjamin F. Allen individually, who was president of the Cook County National Bank, a private banker at Des Moines, and a member of the firm of Allen, Stephens & Co. Bowen made purchases and sales of stocks, loans and collections for him in New York City and always placed the money arising from such transactions in some bank to the credit of the Cook County National Bank. Blennerhasset, a member of the firm of Allen, Stephens & Co. and a witness for the plaintiff, testified that the notes belonged to his firm, were advanced by them to the Cook County National Bank and delivered to Bowen to raise money on; while Bowen, a witness for the defend-

ant, testified that Blennerhasset, when he gave him the notes, informed him that they, referring to the entire $300,000 notes, belonged to Allen, but that the proceeds thereof should be placed to the credit of the Cook County National Bank. On Blennerhasset's cross-examination it appeared that Allen, on the 18th of November, 1874, gave his firm a mortgage upon all his real estate to secure them for the balance due them from the Cook County National Bank past and future.

November 20th, 1874, Allen, Stephens & Co. made out a bill to the Cook County National Bank of the three notes less discount, charging it with $29,463.34, with the memorandum: "Bowen reports the paper 30,000 at German-American Bank as collateral to a call loan to you." (Exhibit E.)

November 23d, 1874, the Cook County National Bank upon its books credited Allen, Stephens & Co. "By paper by Bowen $29,463.34," and at the same time charged the same to B. F. Allen as follows: "To paper by Bowen $29,463.34."

December 10th, 1873, the Cook County National Bank upon its books credited B. F. Allen as follows: "By credit to correct error of charge 11-13 $29,463.34," and on the same date charged the account of Allen, Stephens & Co. in these words: "To charge to correct error of credit 11-13 $29,463.34."

The deposition of Benjamin F. Allen was taken by the plaintiff February 13th, 1879, when he testified that *he* procured the loan from the German-American Bank through Bowen and that it was made for *him individually* and the money used by him; that he afterwards failed in business and never gave instructions to transfer the notes or the proceeds to any other account. Dissatisfied with this deposition the plaintiff caused him to be re-examined, and the second deposition was taken

December 20th, 1879, when he testified that, on reflection, he believed he was mistaken in his first deposition and that the notes belonged to the Cook County National Bank, because he never used or attempted to use the $5,000 margin and never gave any directions for its application to any purpose.

Chauncey T. Bowen, on the other hand, examined on the part of the defendant, testified that in March, 1875, Allen told him to apply the surplus upon his note at the German-American Bank, endorsed by the witness, which he did.

The Court left the question of fact to the jury, whether or not the Cook County National Bank was the owner of the surplus, as the complaint alleged. There was no exception to the Judge's charge.

No formal assignment of errors appears in the record; but a number of exceptions were taken by the plaintiff in error at the trial in the Court below, which will now be considered in their order.

Points arising on the Exceptions.

I.

First Exception, Printed Record, p. 14, fol. 45. The ruling was correct. The books were the best evidence of what they contained, and besides, the plaintiff's deposition had been taken, and was afterwards received in evidence concerning the entries on the books of the bank.

II.

Second Exception, Printed Record, p. 15, fol. 46. The testimony was properly received, as directly

bearing on the issue of ownership of the notes; and as cross-examination, its allowance was in the discretion of the Court below, and not subject to exception.

III.

Third, fourth, fifth, sixth and seventh Exceptions, Printed Record, pp. 17, 18 and 19, fols. 53 to 57. These exceptions refer to the exclusion of certain evidence concerning certain entries made or caused to be made by the plaintiff, June 25th, 1875, in the books of the Cook County National Bank, long after he had become its Receiver. These entries and his testimony about them and their effect, was of course inadmissible. They were simply the Receiver's own statements and conclusions, and could not affect the defendant's rights.

IV.

Eighth, Ninth and Tenth Exceptions, Printed Record, pp. 20 and 21, fols. 61, 62 and 63. The ruling to which these exceptions refer was clearly right. The third subdivision of the complaint alleges "that the said three promissory notes were at said date (February 20th, 1875), the property of said plaintiff, as Receiver of the Cook County National Bank." The answer contains certain statements concerning the circumstances under which the defendant came into possession of the notes

through Bowen, the then apparent owner thereof and whom it believed to be such, and that upon his order they subsequently applied the surplus in question, and contains a general denial of each and every allegation of the complaint, except as therein stated or admitted. This was a direct denial of the allegation of the plaintiff's ownership in the complaint alleged. The plaintiff's contention that the defendant could not introduce evidence of ownership in anyone save Chauncey T. Bowen, was simply frivolous. The answer does not even allege that Bowen was the owner; but if it did, it would not have precluded the defendant from showing that Allen or somebody else was the owner, in order to disprove the allegation of the complaint that the Cook County National Bank was the owner. *Its* alleged ownership was the question at issue.

V.

Eleventh Exception, Printed Record, p. 21, fol. 64. The ruling was correct. The plaintiff's witness Allen had testified in both depositions that he had never given instructions to transfer the proceeds of the notes or to apply the surplus to any purpose. Printed Record, fols. 58 and 60. The defendant had a clear right to contradict this, especialiy as Allen had given that fact as a reason why he changed his testimony on the subject of ownership.

VI.

Twelfth Exception, Printed Record, p. 24, fol. 71. This again has reference to the exclusion of entries

in the books of the Cook County National Bank after its failure, disposed of in Point III.

VII.

Thirteenth Exception, Printed Record, p. 26, fol. 78. This is an exception to the refusal of a new trial, for which, as I understand it, this Court will not reverse a judgment.

Kerr vs. Clampitt, 95 U. S., p. 188, and other cases there cited.

But if this Court should entertain any argument on the subject of this exception, it is submitted, that there was no error in the refusal of a new trial.

The question of ownership was purely one of fact, was so treated by the Court in its charge to the jury and acquiesced in by the defendant. There was no request to direct the jury to find for the plaintiff. But it was claimed upon the argument of the motion for a new trial in the Court below and will probably be insisted on here, that it conclusively appeared by the evidence that the Cook County National Bank was the owner of the notes. The answer to such a contention is:

1st. The bill of exceptions does not show that it contains *all* the evidence in the case.

2d. There was great conflict of evidence concerning the question of ownership. The entries in the books of the Cook County National Bank negatived its ownership and favored the presumption that either Allen or Allen, Stephens & Co., was the owner. The first entries, November 23d, 1874, clearly showed a transfer of the notes from Allen, Stephens & Co. to B. F. Allen, through the medium